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State of Utah

DEPARTMENT OF NATURAL RESOURCES

Division of Water Rights

MICHAEL R. STYLER JERRY D. OLDS
Executive Director *State Engineer/Division Director*

March 12, 2007

Bryan Smith, Commissioner
Deep Creek Distribution System
P. O. Box 54
Tridell, UT 84076

Dear Bryan:

During the annual meeting of the Deep Creek Distribution system Feb. 14, 2007, you brought up a continuing distribution problem that is encountered when there is a shortage of water, and asked for direction.

The problem involves the distribution of water based on Temporary Court Order, Civil No. 3444 which was issued on July 5, 1956, with another Temporary Court Order being issued on May 25, 1957. The second order reaffirmed that the water was to be measured and delivered according to the previous order. The plaintiffs were Ollie W. Justice and Deep Creek Irrigation Company. Defendant, Mosby Irrigation Company, was ordered to install a measuring device above the confluence of Deep Creek and Mosby Creek. The plaintiffs were to install a measuring device at their two points of diversion and divert no more water from their points of diversion than that flowing in Deep Creek above the confluence with Mosby Creek. In a counterclaim filed June 16, 1956, the defendant Mosby Irrigation Company, alleged that the plaintiffs had diverted "considerable quantities" of Mosby Irrigation Company's "private trans-mountain" water and sought redress from the court. Redress for water taken by the plaintiffs was not granted, but the quantity of water allowed, to be diverted by the plaintiffs was limited in the Court Order to the quantity of water flowing in Deep Creek above its confluence with Mosby Creek. Also, in the Court Order, the defendant was granted the right to "... use Deep Creek as a conveying channel for its water...".

Historically, the plaintiffs, although junior in priority to downstream users, had been able to divert water from Deep Creek late in the season when the water would not reach the diversion structure of senior appropriators. The use of Deep Creek as a canal by Mosby Irrigation Company ensured the senior users that their Deep Creek water would reach their diversion whenever Mosby Irrigation Company was delivering water through Deep Creek, thereby depriving the historic use of water by the plaintiffs.

Plaintiff Deep Creek Irrigation Company is no longer in existence and their water rights have lapsed. Successors to Plaintiff Ollie W. Justice are John W. and Shelley J. Justice hereafter referred to as plaintiff.

Ultimately, the question that has been raised is, what is the source of the water to be diverted by the plaintiff under the court decree? The source must either be Deep Creek or Dry Fork Creek. Downstream from the plaintiff's point of diversion are senior water rights totaling more than 4 ½ cfs. If the source is Deep Creek, then the plaintiff would have no right to divert the water due to priority, making the court order meaningless. If the source is Dry Fork Creek, then the water must be supplied by Mosby Irrigation Company from their trans-mountain diversion.

A "MOTION FOR ISSUANCE OF ORDER TO SHOW CAUSE" dated Oct. 31, 1957, filed by the defendants sheds light on the defendants' understanding of the source of the water to be diverted by plaintiffs under the order. Paragraph 1.b. of the Motion reads in part, "That despite such order, the said Plaintiff, Ollie W. Justice, and the Deep Creek Irrigation Company, a corporation, on or about the 5th of day of October, and on many days subsequent thereto, in direct contravention of the Order of the Court, willfully and maliciously, took water belonging to the defendant, Mosby Irrigation Company, a corporation, far in excess of that allowed under the Order of the Court, ..." In other words the plaintiffs had allegedly taken more of the defendants' water than they were allowed under the Court Order.

It is reasonable to assume that those involved with the measuring and delivery of water in the summer of 1956, understood that there were senior appropriators on Deep Creek downstream from the plaintiffs' points of diversion. It is also reasonable to assume that if the senior downstream users had been deprived of their Deep Creek water in 1956, that it would have been brought out before the second order was issued in 1957. If the senior downstream users were not deprived of their Deep Creek water, then the water delivered to the plaintiffs must have been Dry Fork Water diverted by the defendant. Also from the defendants' Motion dated Oct. 31, 1967, it is apparent that also the understanding of the defendants that the source of water to be diverted by the plaintiffs under the Court Order was Dry Fork.

It is the opinion of the Division of Water Rights that, unless clarification is received from the Court stating otherwise, the source of the water, delivered to the plaintiff under the Court Order, should be considered as Dry Fork. As Deep Creek Distribution System Commissioner, you are directed to report the delivery of water, under the Temporary Court Order, Civil No. 3444 issued July 5, 1956, as diverted from Dry Fork Creek by Mosby Irrigation Company.

Sincerely,



Robert W. Leake, P.E.
Regional Engineer

Copy to: Mosby Irrigation Co.
John and Shelly Justice
Lee Sim